

ROBERT LEWIS WILLICH §
v. § CIVIL ACTION NO. 6:08cv378
DIRECTOR, TDCJ-CID §

The Petitioner Robert Willich, proceeding *pro se*, filed this application for the writ of habeas corpus complaining of the legality of his conviction. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Willich was convicted of driving while intoxicated, receiving a sentence of 18 years in prison. He took a direct appeal, in which his conviction was affirmed by the Court of Appeals and his petition for discretionary review was dismissed as untimely filed. He then sought state habeas corpus relief, in which he was granted the right to file an out-of-time petition for discretionary review. Willich did so, and that petition was denied. He then filed a second state habeas petition, which was denied without written order. Willich then sought federal habeas corpus relief.

The Respondent was ordered to answer and did so, arguing that the petition is successive and that the statute of limitations has expired. Willich filed a response which primarily argued the merits of his claim, although he did contend that the limitations period had not expired and that the petition was not successive because it was his first such petition challenging his conviction.

After review of the pleadings, the Magistrate Judge issued a Report on February 19, 2009, recommending that the petition be dismissed without prejudice as successive. The Magistrate Judge first stated that the Respondent's argument concerning the statute of limitations was foreclosed by

a Supreme Court decision which was rendered after the answer had been filed. Jimenez v. Quarterman, 129 S.Ct. 681, 686 (2009). However, the Magistrate Judge said, Willich's petition was successive because he had previously sought habeas corpus relief in federal court, at a time when the facts forming the basis of the present petition were known to him. While Willich's previous federal habeas petition concerned a disciplinary case, the Magistrate Judge said, the Fifth Circuit has specifically stated that a habeas challenge to a conviction may be successive if filed after a habeas challenge to a disciplinary case. Reed v. Quarterman, slip op. no. 07-10045 (5th Cir., August 20, 2007) (unpublished) (available on WESTLAW at 2007 WL 2436206), *citing* In Re Jimenez, 211 Fed.Appx. 297, 298 (5th Cir. 2006). The Magistrate Judge therefore recommended that Willich's petition be dismissed without prejudice, with Willich allowed to refile at such time as he obtains leave from the Fifth Circuit Court of Appeals to file a second or successive petition. The Magistrate Judge also recommended that a certificate of appealability be denied *sua sponte*, specifying that the denial of such a certificate should refer only to an appeal of this case and not affect Willich's right to seek permission to file a second or successive petition.

Willich filed objections to the Magistrate Judge's Report on March 4, 2009. In these, he says that he objects to the Magistrate Judge's recommendation and that he "does have showing [sic] of his constitutional rights and they have not yet been underlying in his claim." Willich then says "therefore, petitioner agree with the Magistrate Judge recommendation on allowing him to seek permission from the 5th Cir to file a second or successive petition, or seek a lawyer when he is released on parole in less than 30 days, petitioner file this objection that he may not be bar so he can appeal." These objections show no basis for setting aside the Magistrate Judge's Report.

The Court has conducted a careful *de novo* review of the pleadings in this cause, including the original petition, the answer of the Respondent, the Petitioner's response thereto, the state court records, the Report of the Magistrate Judge, the Petitioner's objections thereto, and all other pleadings, documents, and records in the case. Upon such *de novo* review, the Court has concluded that the Report of the Magistrate Judge is correct and that the objections of the Petitioner, to the

extent that he objects to the proposed findings and conclusions of the Magistrate Judge, are without merit. It is accordingly

ORDERED that the Petitioner's objections are overruled and that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED without prejudice. Willich may refile this petition at such time as he obtains leave from the Fifth Circuit Court of Appeals to file a second or successive petition. The dismissal of the present petition shall have no effect upon Willich's right to seek such permission from the Fifth Circuit, nor on his right to refile his petition at such time as this permission is obtained. It is further

ORDERED that the Petitioner Robert Willich is hereby DENIED a certificate of appealability *sua sponte*. The denial of this certificate refers only to an appeal of the present petition, and likewise shall have no effect upon Willich's right to seek permission from the Fifth Circuit, nor on his right to refile his petition at such time as this permission is obtained. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 16th day of March, 2009.

A handwritten signature in black ink, appearing to read 'Leonard Davis', written over a horizontal line.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**